Supreme Court, U.S.
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No. 92-1289

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOSE M. OTERO, *pro se*,
Petitioner,

v.

INTERNATIONAL GENERAL ELECTRIC CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT MALLINCKRODT, INC.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the First Circuit erred in affirming the district court's denial of petitioner's request for reopening of the case under Rule 60(b)(3) of the Federal Rules of Civil Procedure.

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RESPONDENT MALLINCKRODT, INC.'S BRIEF IN OPPOSITION

OPINIONS BELOW

José Otero Laborde v. International General Electric Company et al., No. 91-1987, Per Cuiram dated June 29, 1992 (unpublished) (See Appendix to Petition for Writ of Certiorari at A-1 through A-4)

José Otero Laborde v. International General Electric Company et al., No. 91-1987, Judgment dated June 29, 1992 (See Appendix to Petition for Writ of Certiorari at A-5)

José Otero Laborde v. International General Electric Company, et al., Civil No. 87-278 (JAF), Order dated August 8, 1991 (unpublished) (See Appendix to Respondent Mallinckrodt, Inc.'s Brief in Opposition at pages 1a-2a)

José Otero Laborde v. International General Electric Company et al., Civil No. 87-278 (JAF), Judgment dated October 18, 1988 (unpublished) (See Appendix to Petition for Writ of Certiorari at page A-11)

APPLICABLE STATUTE

FEDERAL RULES OF CIVIL PROCEDURE RULE 60(b), 28 U.S.C.:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have been prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . .

STATEMENT OF THE CASE

This is a product's liability action filed against General Electric Company ("General Electric") and Mallinckrodt, Inc.[1] ("Mallinckrodt") by relatives of Mr. Rubén Otero Laborde, deceased.

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[1] Respondent Mallinckrodt has complied with Rule 29.1 of the Rules of this Court listing all parent companies and subsidiaries

The original complaint was filed on February 26, 1987, under the diversity of citizenship jurisdiction of the district court. The complaint alleged that Mr. Rubén Otero Laborde died as a result of an anaphylactic and respiratory arrest suffered while undergoing a CT scanning test performed by Dr. José M. Lázaga at the CT Scan and Radiology Center in Hato Rey, Puerto Rico.

General Electric was sued as the manufacturer of the machine in which the medical test was performed. Mallinckrodt was sued as the manufacturer of Conray 60, the contrast media injected to Mr. Otero Laborde as part of the procedures for computerized tomography.

A Jury Trial commenced in Federal District Court for the District of Puerto Rico on October 11th, 1988. On the third day of trial the district court granted General Electric's motion for directed verdict. At the conclusion of trial, plaintiffs and Mallinckrodt informed the court that a settlement stipulation had been reached. On October 18, 1988 judgment was entered dismissing the complaint against Mallinckrodt with prejudice pursuant to the stipulation of the parties. On November 7th, 1988 plaintiffs, including petitioner, signed a release on all claims and liabilities, for ever discharging defendant Mallinckrodt from all liability to plaintiffs, arising or to arise as a result of the facts alleged in the complaint. On November 15th, 1988 a notice of appeal was filed by plaintiffs. However, said notice was withdrawn through motion dated November 22, 1988. The withdrawal motion was granted, by the district court on December 12th, 1988.

On July 18, 1991, over two and a half years later, petitioner, proceeding pro-se on behalf of himself and other plaintiffs, filed a motion to reopen the case on the grounds that the district court's judgment was procured by fraud committed through a conspiracy between Gen-

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in its Motion Requesting Enlargement of Time filed on February 24, 1993.

eral Electric and Mallinckrodt. On August 8th, 1991 the district court summarily denied petitioner's motion.

On September 5th, 1991 petitioner, proceeding pro-se on behalf of himself and other plaintiffs, filed a notice of appeal before the court of appeals. On June 29th, 1992 the United States Court of Appeals for the First Circuit affirmed the district court's denial of petitioner's request to reopen the case. The opinion rendered by the court of appeals holds that petitioner's motion was correctly denied as to all plaintiffs besides petitioner, since he is not an attorney admitted to practice and cannot represent other parties. Although petitioner couched his motion in terms of a "Motion to Reopen Case" on the grounds of fraud, the motion is, in substance, a motion under Federal Rule of Civil Procedure 60(b)(3). Since it was filed over two years after the district court's October 18, 1988 judgment, petitioner's motion was properly denied as untimely. Additionally it was held that the district court did not abuse its discretion in rejecting any other grounds for relief from judgment that petitioner's motion could be read to raise.

Petitioner filed a Motion for Rehearing and Motion to Supplement Petition for Rehearing, motions that were denied by the court of appeals on September 2, 1992. The court's mandate was issued on September 10, 1992. A Motion to Recall Mandate, filed by petitioner, was denied on October 2, 1992. A Motion to Extend Time for Filing a Petition for Writ of Certiorari to and including January 30, 1993, filed before this Court was granted November 9, 1992.

Petition for Writ of Certiorari was filed January 29, 1993. The petition raises several issues which go beyond the scope of the question presented before the district court and the court of appeals in Mr. Otero's request to reopen the case.[2] The raising of said issues distracts the

[2] Petitioner's Writ of Certiorari does not present for review the court of appeals' determination that the "motion to reopen" is a motion filed pursuant to Rule 60(b)(3) of the Federal Rules of

attention of this Court from the central and only issue which is the propriety of the denial for reopening of the case under a motion pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure.

Respondent Mallinckrodt's Motion Requesting Enlargement of Time to File Brief in Opposition was granted, extending the filing date to and including March 31, 1993.

SUMMARY OF REASONS FOR DENYING THE WRIT

The petitioner, unsatisfied with his settlement agreement disposing of his claim, seeks relief from judgment issued on October 18th, 1988. Relief is sought pursuant to a motion filed under Rule 60(b)(3) of the Federal Rules of Civil Procedure.

The petition should be denied since the court of appeals' determination affirming the district court's order dated August 8, 1991 is correct insofar as a motion under Rule 60(b)(3) of the Federal Rules of Civil Procedure is addressed to the sound discretion of the trial court and must be filed within one year of the entry of judgment. A motion filed well after this period must be denied by the trial court and such denial does not constitute abuse of discretion. Absent an abuse of discretion, an order denying relief under Rule 60(b)(3) cannot be overturned.

Furthermore, the writ should be denied because the federal questions presented satisfy none of the criteria of Rule 10 of this Court. There is no discrepancy between the decision of the court of appeals and the federal caselaw. Therefore, there is no basis for granting the writ.

Civil Procedure. Furthermore, Mr. Otero's petition does not present for review the issue of Mr. Otero's inability to represent plaintiffs other than himself.

REASONS FOR DENYING THE WRIT

I. RESPONDENT'S MOTION TO REOPEN THE CASE WAS UNTIMELY FILED.

Rule 60(b) provides "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding, for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." This rule further states that ". . . [t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

A very generous reading of petitioner's allegations could suggest that the basis for his petition is that respondents committed fraud by presenting the testimony of two expert witnesses that did not reveal that their own previous medical literature supposedly contradicted their testimony in court. Henceforth, petitioner's motion to reopen is clearly a motion pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure.

As established by Rule 60(b), when a motion is based on an allegation of fraud the same must be filed ". . . within a reasonable time . . ." but not more than one year after judgment. Petitioner's motion to reopen the case was filed on July 18th, 1991, thirty-three (33) months after the entry of judgment and twenty-one (21) months after the expiration of the one year period mandated by Rule 60(b). In *U.S. v. Marin*, 720 F.2d 229, 231 (1st Cir. 1983) the court of appeals, addressing the issue of timeliness in the filing of a Rule 60(b) motion, held:

> Even assuming that Caribbean's [appellee's] substantive claims have merit, which is doubtful, no relief can be granted. Federal Rule of Civil Procedure 60

> (b) provides specifically: "The motion shal be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after judgment, order or proceeding was entered or taken." Caribbean's Rule 60(b) motion was made twenty-eight months after judgment was entered against it, sixteen months after the expiration of the one year period mandated by the rule. This is an absolute bar to relief from the judgment.

This timeliness norm has been reaffirmed by the Court of Appeals for the First Circuit in a substantial number of cases. See *Elias v. Ford Motor Company*, 734 F.2d 463, 467 (1st Cir. 1984); *Chang v. Smith*, 778 F.2d 83, 85 (1st Cir. 1985); *Gonzalez v. Walgreens Co.*, 918 F.2d 303, 305 (1st Cir. 1990). Denying relief because the motion is time barred is obviously not an abuse of discretion. *Gonzalez v. Walgreens*, 918 F.2d at 306. When applying the standard adopted by Rule 60(b) and the applicable caselaw to the present case, one can only conclude that the motion to reopen was properly denied by the trial court and properly held untimely filed by the court of appeals.[3]

II. THERE WAS NO ABUSE OF DISCRETION IN DENYING PETITIONER'S MOTION TO REOPEN THE CASE.

A Rule 60(b) motion is addressed to the sole discretion of the trial court. *Pagán v. American Airlines Inc.*, 534 F.2d 990, 993 (1st Cir. 1976); *U.S. v. Berenguer*, 821 F.2d 19, 20 (1st Cir. 1987); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988); *U.S. v. Bosch Oldsmobile, Inc.*, 909 F.2d 657, 660 (1st Cir. 1990). Appellate review of an order denying relief under Rule 60(b)

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[3] Petitioner's request for writ of certiorari is based on his allegation that *Cipollone v. Liggett Group, Inc.*, No. 90-1038, Opinion of June 24, 1992, 60 USLW 4703, supersedes all cases upon which the court of appeals rendered its decision. A review of the opinion in *Cippolone* clearly demonstrates its inapplicability to the case at bar.

is limited to abuse of discretion. *Browder v. Director*, 434 U.S. 257, 263 n.7 (1978); *U.S. v. Bosch Oldsmobile*, 909 F.2d at 660; *Rodríguez-Antuna v. Chase Manhattan Bank Corporation*, 871 F.2d 1, 3 (1st Cir. 1989); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982). Abuse of discretion is found in very limited circumstances. In *U.S. v. Bosch*, 909 F.2d at 660, the court of appeals stated:

> This court will find an abuse of discretion only when there is definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of all the relevant factors.

There can be no finding of abuse of discretion by the district court or the court of appeals where the motion to reopen the case was filed twenty-one (21) months after the expiration of the term thereof and thirty-three (33) months after the entry of judgment. Furthermore, petitioner was represented by legal counsel throughout trial proceedings and through the filing of a notice of appeal November 15, 1988, which was withdrawn on November 22, 1988.[4]

III. AN APPEAL FROM AN ORDER DENYING A RULE 60(b) MOTION DOES NOT BRING BEFORE THIS COURT THE ISSUE OF THE MERITS OF THE UNDERLYING JUDGMENT.

A Rule 60(b) motion is not an admissible substitute for an appeal. *Ojeda-Toro v. Rivera-Méndez*, 853 F.2d 25 (1st Cir. 1988); *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645 (1st Cir. 1972). For that reason, an appeal from an order denying a Rule 60(b) motion does not bring before this court the issue

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[4] Petitioner fails to state in his statement of the case that a notice of appeal was filed by his legal counsel and withdrawn within two weeks from filing. Petiitoner's request for writ of certiorari is not based on lack of proper legal counsel or wrongdoing on the part of his legal representation.

of the merits of the underlying judgment. This rule was clearly stated in *Rodríguez-Antuna v. Chase Manhattan Bank Corporation*, 871 F.2d at 2:

> We begin by delineating what is properly before us, and, equally important, what is not. No appeal was taken from the May 24th, 1988 judgment within the time allowed by the law. Thus, the merits of the judgment are not susceptible to review. The notice of appeal was, however, timely as to the district court's refusal to relief plaintiffs from the judgment. The September order, therefore, may be evaluated in this proceeding. But a punctual appeal from an order denying such a motion does not automatically produce a Lazarus-like effect; it cannot resurrect appellant's expired right to contest the merits of the underlying judgment, nor bring the judgment itself before us for review. See *Browder*, 434 U.S. at 263 n.7, 98 S.Ct. at 560 n.7; *Ojeda-Toro v. Rivera-Méndez*, 853 F.2d 25, 28-29 (1st Cir. 1988); *Lepore v. Vidockler*, 792 F.2d 272, 273-74 (1st Cir. 1986). Thus, our inquiry is restricted to the propriety of the September order.

What is properly before this Court is petitioner's request to reopen the case on the basis of a Rule 60(b)(3) motion. Petitioner's writ claims that the medical expert witnesses at trial gave testimony that was inconsistent with a number of prior medical publications that the witnesses themselves had written. The publications, according to petitioner, are far more favorable to his position than the witnesses' testimony at trial. Petitioner characterizes the alleged discrepancy as fraudulent and asserts that it was a result of a conspiracy by respondents. It is on the basis of these allegations that relief of judgment is sought. However, judgment dismissing the claims against respondent Mallinckrodt was the result of a settlement stipulation between the parties and not pursuant to any jury or court determination based on the evidence presented, which could have been influenced by any alleged fraudulent testimony. The Court of Ap-

peals for the First Circuit has recognized that ". . . any settlement is a result of a compromise, each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion." *Greensman v. Bougan*, 492 F.2d 375, 382 (1st Cir. 1974). It is possible that petitioner is not now satisfied with the settlement reached. Clearly, what petitioner is attempting to obtain through the filing of this writ is that the Court enter into the merits of the evidence presented by all parties at trial as well as the judgment adopting settlement in the case. Granting of petitioner's request would result in conversion of a Rule 60(b) petition into an appeal. This contravenes the essence of Rule 60(b).

IV. PETITIONER'S WRIT FAILS TO SATISFY THE CRITERIA OF RULE 10 OF THE RULES OF THIS COURT.

Rule 10 of the Rules of this Court establishes in its pertinent part [5]:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower

[5] The Petition for Writ of Certiorari cites as applicable criteria for consideration of review Rule 10.1(a) and (c) of the Rules of this Court.

> court, as so cail for an exercise of this Court's power of supervision.
>
> (b) . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner's request for writ of certiorari fails to meet the criteria established in Rule 10.1(a) and (c). The petition alleges that the applicable criteria is met by reason of the inconsistency of the court of appeals' decision with current federal caselaw. Said argument is based on petitioner's reading of *Cipollone v. Liggett Group, Inc.*, No. 90-1038, Opinion of June 24, 1992, 60 USLW 4703. A review of said opinion reveals the same does not apply to the issues before the Court.

Cipollone is a case dealing with pre-emption by federal law of causes of action created by state law. The Court held that the representations made by a cigarette manufacturer create certain obligations towards consumers. Said obligations are not pre-empted by the federal law regulating labeling of the products since they constitute state law-created claims beyond the reach of the federal statute's intent.

The issues addressed in *Cipollone* have no bearing on the issues presented in this case or the caselaw cited by the court of appeals in its decision. Said caselaw is, thus, in full force and effect and has not been altered by the opinion rendered in *Cipollone*.

Furthermore, the writ should be denied because the remaining federal questions presented satisfy none of the criteria of Rule 10 of this Court. There is no discrepancy between the decision of the court of appeals and the federal caselaw. The decision rendered by the court of

appeals is consistent with the spirit and intent of Rule 60(b) and the governing caselaw. Therefore, there is no basis for granting the writ.

CONCLUSION

The Federal Rules of Civil Procedure are clear in stating the filing of an appeal shall be made within thirty days from the entry of judgment. Furthermore, the filing of a Rule 60(b)(3) request shall be made within a reasonable time not to exceed one year from date of judgment. Petitioner's 60(b)(3) motion was filed thirty-three (33) months after the entry of judgment, and twenty-one (21) months after the expiration of the applicable period. Petitioner has brought before this Court issues which go beyond what is possible to consider at this point, which is only whether the Court of Appeals for the First Circuit erred in affirming the district court's denial of petitioner's request for reopening of the case pursuant to Rule 60(b)(3). The court of appeals has not erred in deciding that petitioner's request was untimely and that the district court did not abuse its discretion.

In his petition for writ of certiorari Mr. Otero Laborde is specific in stating that he first came upon his alleged evidence of fraud and conspiracy on September 13, 1990 (See Petition for Writ of Certiroari at page 4). Yet he failed to file any request with the district court for an additional ten (10) months. Furthermore, petitioner was represented by counsel throughout trial proceedings and up to the filing of a notice of appeal within weeks of the entry of judgment adopting the stipulation between the parties. Mr. Otero Laborde fails to state in his Petition said notice of appeal was withdrawn through his legal counsel within two weeks of its filing. Mr. Otero Laborde has brought forth no evidence that the reopening of the case he now seeks is the result of the withdrawal of the beforementioned notice of appeal.

The Court of Appeals for the First Circuit was correct in affirming the district court's order denying the reopening of the case. The Federal Rules of Civil Procedure are clear in stating the term for such filing. Furthermore, the court of appeals found no abuse of discretion as the filing in question was clearly untimely. In its opinion the court of appeals applied the prevailing federal case-law in its review of the district court's determination. Mr. Otero Laborde's dissatisfaction with the settlement of this case is not a sufficient reason to grant the reopening of the same, specially when doing so would contravene the clear language of Rule 60(b).

Respectfully submitted,

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APPENDIX

APPENDIX

[Order Dated August 8, 1991 (Unpublished)]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civ. No. 87-0278 (JAF)

JOSE M. OTERO LABORDE, *et al.*,
Plaintiffs

vs.

INTERNATIONAL GENERAL ELECTRIC,
MALLINCKRODT, INC., *et al.*,
Defendants

Plaintiffs' *pro se* Motion

[Filed July 18, 1991]

TO REOPEN CASE ON THE BASIS OF DEFENDANTS' MALLINCKRODT AND GENERAL ELECTRIC'S CONSPIRACY TO COMMIT FRAUD, CONCERTED FRAUD UPON THE COURT, and Hon. Judge José A. Fusté by defendants and its expert witnesses Drs. Parker, McClellan and Aten as well as Dr. Lazaga with memorandum of law in support therein.

To the Honorable Judge José A. Fusté:

Comes now Plaintiffs Elvira Laborde Otero, José, Minerva, Rene Otero Laborde and to this Honorable Court respectfully state and pray;

1). That since the inception of this trial in September 1988, Drs. Charles Parker, MD and Bruce L. McClennan, MD, representing Mallinckrodt Inc. as

'*expert-witnesses*' concealed and conspired in concerted manner among themselves and with a subsequent "live-expert witness" Dr. Edward M. Aten, also from Mallinckrodt Inc.; by refusing to disclose medical literature, *WRITTEN BY THEMSELVES PRIOR TO TRIAL* which would have proven that there is "something" in the medical literature, INDEED, that

* * * *

[Judge's Order penciled in as follows:]

Denied.

/s/ JAF
8/8/91